



**THE ATTORNEY GENERAL
OF TEXAS**

June 19, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Jack Rains
Secretary of State
P. O. Box 12697
Austin, Texas 78711

Open Records Decision No. 525

Re: Whether information in
notary complaint investiga-
tion files maintained by the
Secretary of State must be
released under the Texas
Open Records Act, article
6252-17a, V.T.C.S. (RQ-1269)

Dear Mr. Rains:

The Secretary of State's Statutory Documents Section received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for a listing of all complaints against notaries public and for "permission to review all complaint files that exist in your office." Your request letter indicates that the Secretary of State's office is willing to release complaint information, including the name of the complainant, the name of the notary complained of, and the final action taken by the Secretary of State's office. You express concern, however, about releasing the entire complaint file. You claim that sections 3(a)(1), 3(a)(3), and 3(a)(11) of the Open Records Act protect some of the information from required public disclosure. You also ask about the effect on the open records request of section 406.012 of the Government Code.¹

1. Section 406.012 derives from article 5949, repealed by the 70th Legislature. The 70th Legislature also purported to amend section 9 of article 5949. Acts 1987, 70th Leg., ch. 891, § 5, at 2989. The amendment to section 9 of repealed article 5949 must be given effect if possible. Gov't Code § 311.031(c). Subsection (a) of section 406.012 of the Government Code refers to keeping records only "[a]fter a notary public qualifies." The 70th Legislature, however, deleted this language from section 9 of article 5949. Acts 1987, 70th Leg., ch. 891, § 5, at 2989. It is unnecessary to reconcile these provisions here.

Subsection (a) of section 406.012 of the Government Code provides:

After a notary public qualifies, all records concerning the appointment and qualification of the notary public shall be kept in the office of the secretary of state. The records are public information. (Emphasis added.)

This provision expressly makes public "all records concerning the appointment and qualification" of notaries public.

Subsection (a) of section 406.012 of the Government Code makes public all records relating to the "appointment and qualification" of notaries public. Your request letter notes that the terms "appointment" and "qualification" have specific meanings:

Appointment involves the submission of an application by a person desiring to be a notary public, and the action by the Secretary to appoint such person to the office of notary public. Qualification is the process whereby an appointed notary public pays to the Secretary the fees required for commissioning and secures a bond for faithful performance of duties. We recognize that the records of this office relating to appointment and qualification of a notary public are public records in accordance with section 9. We believe that section 9 may, in fact, limit the notary public information which is public to appointment and qualification information, and may be interpreted to exclude from public information, other information pertaining to notaries public such as information regarding complaints against the notary public and pending administrative actions which may result in revocation, suspension or taking of other disciplinary action against the notary.

You argue that complaint files are not records relating to the appointment and qualification of notaries public and that the files are, therefore, by negative implication, not public records.

Section 406.005 of the Government Code sets forth specific information that applicants must include on their applications for appointment. Several other provisions address the process and requirements for appointment and reappointment of notaries public. See, e.g., Gov't Code §§ 406.006, 406.007, 406.009, 406.010, 406.011. Section 406.009 provides for the rejection of the appointment and the suspension or revocation of the commission of a notary public for "good cause." Complaints against notaries public could result in the rejection of an application for reappointment or in the suspension or revocation of the commission of a notary public. Nevertheless, complaints against notaries public do not concern the appointment of notaries public within the meaning of subsection (a) of section 406.012 of the Government Code. Nor do complaints relate to the qualification of notaries public. See Gov't Code § 406.006 (applicant must "qualify" by taking oath, posting bond, and paying fees). Notary public complaint files therefore are not expressly made public by section 406.012. Of course, if a complaint results in action by the Secretary of State such as refusing reappointment or revoking the commission of a notary public, the letter from the Secretary of State may be a public record. See V.T.C.S. art. 6252-13a, § 4(a)(3) (all final orders, decisions, and opinions of an administrative agency shall be made available for public inspection). The Open Records Act exceptions do not, as a general rule, apply to information expressly made public by statutes other than the Open Records Act. Open Records Decision Nos. 147 (1976); 43 (1974); see also Open Records Decision Nos. 511 (1988); 221 (1979).

You suggest that the fact that certain records are designated expressly as public by section 406.012 implies that the records not designated public are exempt from public disclosure. We disagree. The purpose of section 406.012 of the Government Code is to provide the public an express right of access to specific information, information concerning the "appointment and qualification" of notaries public. The legislature initially passed the provision before the enactment of the Open Records Act. Prior to the enactment of the Open Records Act, the public might not have had a right of access to information that was not expressly designated public. But see Hutchins v. Texas Rehabilitation Comm'n, 544 S.W.2d 802 (Tex. Civ. App. - Austin 1976, no writ) (common-law right of access of individual to information about that individual); Palacios v. Corbett, 172 S.W. 777 (Tex. Civ. App. - San Antonio 1915, writ ref'd) (common-law right of citizen to information regarding public funds); Open Records Decision No. 25 (1974) (common-law right of public to records that statute required justice of

the peace to keep). The Open Records Act expressly makes public all information held by governmental bodies unless one of the act's exceptions to disclosure protects the information. V.T.C.S. art. 6252-17a, § 3(a); Attorney General Opinion JM-672 (1987). Information cannot be withheld from public disclosure by negative implication simply because a statute designates other specific information as public information. See Open Records Decision No. 465 (1987) (nullified on other grounds by statute, see Open Records Decision No. 498 (1988)). Consequently, notary complaint files are not exempt from public disclosure simply because subsection (a) of section 406.012 of the Government Code does not expressly list complaint files as public information.

You claim that sections 3(a)(1), 3(a)(3), and 3(a)(11) of the Open Records Act protect information in notary complaint files. The documents you submitted for review include an "Information Interview" sheet, a memorandum from an attorney in the Corporations Section to a special assistant in the Statutory Documents Section, a cover letter transmitting a Petition for Revocation of Notary Public Commission, a cover letter transmitting a copy of a Proposal for Decision, Proposals for Decision, Default Judgment and Order of Revocation, Motions to Dismiss, Agreed Settlements, requests to the Department of Public Safety for the criminal history of applicants for appointment, reports of Department of Public Safety Investigations, affidavits from complainants against notaries public, responses from notaries public about complaints, and Secretary of State attorneys' notes of interviews with complainants and with law enforcement officials.

To claim section 3(a)(3), the litigation exception, the governmental body must show: 1) that litigation is actually pending or reasonably anticipated and 2) that the information in question "relates" to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987); see Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976). Many of the documents you submitted as representative samples are pleadings filed in administrative hearings to revoke the commissions of notaries public. Transmittal letters, pleadings, motions, proposed orders and the like cannot be withheld from disclosure under section 3(a)(3) once they have been released to the party in litigation against the governmental body. Further, you have not shown how release of the other documents would impair the Secretary of State's litigation interests.

Section 3(a)(11) protects advice and opinion on policy matters in order to encourage open and frank discussion between subordinates and supervisors in the deliberative process. Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); see Open Records Decision Nos. 464 (1987); 222 (1979). The test under section 3(a)(11) is whether inter-agency or intra-agency information consists of advice, opinion, or recommendation that is used in the executive deliberative process. Open Records Decision No. 464. Facts and written observations of facts and events, when such information is severable from advice, opinion, or recommendation, cannot be withheld under section 3(a)(11). Id. at 3. Whether specific information falls within section 3(a)(11) depends upon the circumstances surrounding the creation or collection of the information. Id. at 4.

The information you submitted for review does not include the kind of advice, opinion, or recommendation protected by section 3(a)(11). The one memorandum included in the representative sample consists of a factual account of an interview of a complainant. Section 3(a)(11) does not apply.

Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." This includes common-law and constitutional privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). Information may be withheld under the "public disclosure of private facts" privacy right reflected in section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person and the information is of no legitimate concern to the public. Id. at 683-85. A governmental body must withhold information under section 3(a)(1) on the basis of "false light" privacy only if the governmental body determines that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that serious doubt exists about the truth of the information. Open Records Decision No. 438 (1986). Each part of this test must be met independently.

With regard to these common-law privacy tests, even if release of the information would be embarrassing or if the Secretary of State has doubts about the truth of information contained in notary public complaint files, much of the information may be public. It cannot be said that

information about complaints against notaries public is ordinarily of no legitimate concern to the public or that public interest in disclosure is "minimal." The public has a legitimate interest in complaints against individuals who are licensed or supervised by the state. See, e.g., Open Records Decision Nos. 438 (1986) (complaint against public employee); 308 (1982) (investigation of state licensee); 208 (1978) (complaint against peace officer). On the other hand, if the Secretary of State demonstrates that a complaint is not true, there may be no public interest in it. Decisions about common-law privacy must be made on a case-by-case basis. The representative file you submitted for review is not protected.

Like common-law privacy, constitutional privacy has several different aspects. The Industrial Foundation court indicated that section 3(a)(1) protects information within the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). None of the zones is implicated in the file you submitted for review. The right of privacy also includes a second interest, in nondisclosure or confidentiality, that is somewhat broader. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). Information need not necessarily fall into one of the traditional "zones of privacy" to be protected by federal constitutional disclosural privacy principles. Open Records Decision No. 455 (1987), discussed Fadjo v. Coon, supra, and other developments in federal decisions on constitutional disclosural privacy and concluded that a balancing test applies that balances the public interest in disclosure with the private nature of the information. We have reviewed the representative file you submitted and have determined that federal constitutional privacy does not apply.

In Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987), the Texas Supreme Court recognized a state constitutional privacy right. The court held that a polygraph policy of the Department of Mental Health and Mental Retardation resulted in an invasion of privacy. The court was influenced by the highly intrusive nature of the control questions and by the unreliability of such tests. The control questions included "Do members of your family smoke dope?" and "Have you beaten your kids?" Id. at 204. The questions related to areas having nothing to do with the employee's job performance. The questions also intruded into areas protected by federal constitutional privacy principles. Id. at 205. Complaints filed against an individual for actions that are regulated by the state stand

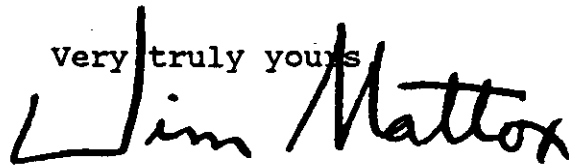
on a different footing. These actions are not related solely to an individual's home or private life; they relate to the individual's government regulated interaction with the public. Texas constitutional privacy does not protect the representative file you submitted for review.

Finally, we note that the file you submitted for review contains criminal history information provided by the Texas Department of Public Safety. This information may be withheld on the authority of previous decisions. See, e.g., Attorney General Opinion H-683 (1975).

S U M M A R Y

Information in the Secretary of State's complaint files against notaries public cannot be withheld by negative implication simply because that type of information is not listed in subsection (a) of section 406.012 of the Texas Government Code. The Texas Open Records Act, article 6252-17a, V.T.C.S., makes public all information held by governmental bodies unless the information falls within one or more of the act's specific exceptions to disclosure. Sections 3(a)(1), 3(a)(3), and 3(a)(11) do not apply to the representative sample complaint file submitted for review except with regard to the criminal history information provided to the Secretary of State by the Department of Public Safety.

Very truly yours



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